SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 410

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SUPREME COURT, U.S.

GARY DUNCAN,

Appellant,

—v.—

STATE OF LOUISIANA,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF LOUISIANA

REPLY BRIEF FOR APPELLANT

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REPLY BRIEF FOR APPELLANT

This Reply Brief is limited to two of the questions discussed in the Brief for Appellee: (1) the status of the charge against the appellant as a crime or a petty offense; and (2) the prevailing practice in the states concerning trial by jury in criminal cases.

I.

Simple battery under La. Rev. Stat. 14:35 is not a petty offense.

A. *The Length of the Sentence Actually Imposed in a Criminal Case Is Not Relevant to a Determination of Whether the Charge Constitutes a Crime or a Petty Offense*

The length of the maximum potential sentence has long been considered by this Court to be one of the relevant

factors in determining whether a charge constituted a crime or a petty offense. See *District of Columbia* v. *Clawans*, 300 U. S. 617, 625-30 (1937); *Schick* v. *United States*, 195 U. S. 65, 67-68 (1904). Appellee has suggested that, in *Cheff* v. *Schnackenberg*, 384 U. S. 373 (1966), this Court abandoned this criterion in favor of one that looks to the length of sentence actually imposed after trial. Brief for Appellee pp. 7-9. This position is untenable for several reasons:

First, in *Cheff* the Court exercised its supervisory power over the lower federal courts to require jury trial in contempt cases whenever a sentence in excess of six months is imposed. There is no discussion in the opinion of the Court of the contours of the constitutional petty offense rule in non-contempt cases. It is incongruous to suggest that the *Cheff* decision, which greatly expanded the right to trial by jury by extending that right to a class of criminal contempt cases, should be interpreted as implicitly narrowing the constitutional right to trial by jury in all other cases.

Second, since there is no maximum potential penalty in criminal contempt cases in federal courts, a rule based on the sentence actually imposed was the only available procedure for distinguishing between serious and minor contempts. In other words, a rule based on potential maximum sentence would result in a jury trial in every contempt case. But see 384 U. S. at 391 (Mr. Justice Douglas, dissenting).

Third, a rule which bases the jury trial right on the sentence actually imposed after trial is workable in the contempt area for the reason that the trial judge, in determining to issue the contempt citation or rule to show cause, has the opportunity before the trial to adjudge the serious-

ness of the conduct charged and the likelihood that a term of imprisonment in excess of six months will be the appropriate penalty. By contrast, the trial judge is normally unfamiliar with the facts of a criminal case before it is tried and cannot be expected to determine whether a sentence in excess of six months may be imposed.

In sum, the Court in *Cheff* did not in any way indicate its intention to expand the scope of the petty offense exception to the Sixth Amendment jury trial right. The considerations that support looking to the sentence actually imposed in contempt cases as a determinant of the jury trial right are not applicable to non-contempt cases.

B. *The Offense Defined by La. Rev. Stat. 14:35 Was Indictable at Common Law and Constitutes Conduct* Malum in Se

In support of his contention that the charge against him constitutes a crime and not a petty offense, appellant argued that simple battery or its equivalent was indictable at common law and that the offense is *malum in se*. Brief for Appellant, p. 7, n. 3. Appellee has taken issue with both of these propositions.

While recognizing that there were no formal distinctions between more and less serious forms of battery at common law, appellee has argued that only serious forms were indictable and that the minor forms were not. Appellee then asserts that simple battery as defined in La. Rev. Stat. 14:35 constitutes a less serious, non-indictable species of battery. Brief for Appellee, pp. 13-23.

At the outset, it should be made clear that La. Rev. Stat. 14:35, under which appellant was charged, is not limited

to petty or minor batteries. Rather it applies to all batteries, of whatever seriousness, that are committed without a dangerous weapon. For example, in *State* v. *Comeaux*, 249 La. 914, 192 So. 2d 122 (1966), the same conduct for which the defendant had been convicted of simple battery under LA. REV. STAT. 14:35 formed the basis of a charge of attempted murder.[1]

Minor or petty batteries can be punished under Louisiana law as a form of disorderly conduct. LA. REV. STAT. 14:103 (A)(1) ("fistic encounters"—punishable by ninety days in prison). Thus, the distinction that does exist under Louisiana law is one that places simple battery under LA. REV. STAT. 14:35 in the more serious category. Appellee has cited the summary treatment of minor batteries under disorderly conduct statutes in other jurisdictions in support of its argument that the jury trial right does not attach to "petty" batteries. Brief for Appellee, pp. 26-28. In this case, the State could have charged appellant with disorderly conduct under LA. REV. STAT. 14:103(A)(1). Having exercised its discretion to charge a more serious offense, punishable by up to two years imprisonment, it is hardly in a position now to justify its denial of jury trial by arguing that jury trial could properly have been denied if a lesser offense had been charged.

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[1] The only gradation of battery *per se* in the Louisiana Criminal Code is that between Aggravated Battery, defined as battery committed with a dangerous weapon, LA. REV. STAT. 14:34, and simple battery, battery committed without a dangerous weapon. LA. REV. STAT. 14:35. The offense charged in *In re Robinson*, 20 D. C. 570 (Sup. Ct. D. C. 1892), where the Supreme Court of the District of Columbia held the defendant to be entitled to trial by jury under the Sixth Amendment, would be charged as simple battery under Louisiana law.

Apart from the fact that LA. REV. STAT. 14:35 does not define a minor form of battery under Louisiana law, appellee's assertion that Blackstone's references to the indictability of battery are limited to aggravated forms of battery is incorrect. In his discussion of private wrongs, Blackstone defined battery as:

> the unlawful beating of another. The least touching of another's person wilfully, or in anger, is a battery . . .

He then defined "wounding" as a private wrong "which consists in giving another some dangerous hurt, and is only an aggravated species of battery." "Mayhem" is defined as:

> an injury still more atrocious, and consists in violently depriving another of the use of a member proper for his defense in fight. This is a battery attended with this aggravating circumstance . . .

Concluding, Blackstone states:

> And here I must observe that for these four last injuries, assault, battery, wounding, and mayhem, an indictment may be brought.[2]

It is clear that Blackstone was referring to all batteries—including that comprised of "the least touching"—in reporting that battery was indictable.[3]

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[2] III BLACKSTONE, COMMENTARIES * 120-22 (1765).

[3] Appellee's reference at p. 16 of its brief to Blackstone's "qualification" of his discussion on assaults and batteries is misleading. In the passage referred to, Blackstone states that assaults, batteries and wounding are "indictable and punishable with fines and imprisonment or with other ignominious corporal penalties, where they are committed with any very atrocious design." IV *Id.* * 216.

(footnote continued on following page)

Thus, appellee's effort to distinguish between more and less serious forms of battery without a dangerous weapon within the meaning of the petty offense exception is unavailing both because LA. REV. STAT. 14:35 does not define a minor form of battery, and because it is quite clear that battery was indictable at common law regardless of the seriousness of the particular offense.[4]

Appellee's argument that battery committed without a dangerous weapon is *malum prohibitum* and not *malum in se* is based largely on the absence of civil disabilities as a result of a conviction of this offense in Louisiana (Brief for Appellee, pp. 34-35), and as such reflects a misunderstanding of these terms. "An act is said to be *malum in se* when it is inherently and essentially evil, that is, immoral in its nature and injurious in its consequences." BLACK, LAW DICTIONARY 1112 (4th ed. 1951). See 2 BOUVIER, LAW DICTIONARY 90 (1839); 1 BLACKSTONE, COMMENTARIES 58. The inquiry focuses on the moral quality of the conduct in question and not on its treatment by the legislature. The "intentional use of force or violence on another" (LA. REV. STAT. 14:33 (definition of battery)) is plainly conduct that is "inherently and essentially evil," entirely without regard to the question of whether a person convicted of this of-

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The "very atrocious design" language defines the circumstances in which corporal punishment was imposed, not, as appellee suggests, the circumstances in which battery was indictable.

[4] In addition to the authorities cited on page 7, note 3 of the Brief for Appellant, the following sources support the conclusion that battery was indictable at common law. R. BURNS, JUSTICE OF THE PEACE 76 (1755); GREENLEAF'S ABRIDGEMENT OF BURN'S JUSTICE OF THE PEACE 30 (Boston 1773); BURN'S ABRIDGEMENT OR THE AMERICAN JUSTICE 52 (Dover, N. H. 1792). See *In re Robinson*, 20 D. C. 570, 571 (Sup. Ct. D. C. 1892). The citation to Hawkins on page 7, note 3 was incorrect and should have been II HAWKINS, PLEAS OF THE CROWN * 369 (6th ed. 1788).

fense can thereafter vote in Louisiana. Moreover, the Louisiana legislature has made known its judgment of the seriousness of the offense by authorizing the imposition of a two year term of imprisonment for its commission.

II.

Appellee has not rebutted appellant's showing that a large majority of states guarantee the right to trial before a jury of twelve in all cases punishable in excess of six months.

In the Brief for Appellant, the prevalence of the right to trial by jury in state criminal procedure is cited as evidence of the fundamental nature of the criminal jury. State practice was referred to for the additional purpose of rebutting any suggestions that the application of the Sixth Amendment jury trial right to the states would impose an intolerable burden on state criminal procedure.

Specifically, appellant contended that thirty-eight states afford a right to trial by a jury of twelve whenever a defendant is charged with an offense punishable in excess of six months.[5] In Section E of its brief (pp. 100-116), appellee discusses the law of numerous jurisdictions in an effort to rebut this contention. But, with the two minor exceptions indicated below, appellee's discussion simply does not meet or contradict the contention of the appellant.

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[5] See Brief for Appellant, pp. 18-19; Appendix B. The six month demarcation was selected not because it is necessarily the applicable test for distinguishing crimes from petty offenses, see *Cheff* v. *Schnackenberg, supra,* 384 U. S. at 387-90 (Mr. Justice Douglas, dissenting), but because it is the only suggested test that would provide a clear standard for surveying state law. See Brief for Appellant, p. 7, n. 3.

On pages 101-107 of appellee's brief, the law of eighteen jurisdictions is discussed, apparently for the purpose of demonstrating that appellant's contention concerning the availability of jury trial in the thirty-eight listed states is "inaccurate and misleading." Five of these jurisdictions—New York, Oregon, Virginia, Virgin Islands and Puerto Rico—are not included in appellant's list of thirty-eight. See Brief for Appellant, Appendix B, pp. 3a-6a. Appellee expressly recognizes that seven others—Alabama, Delaware, Maine, Massachusetts, New Hampshire, North Carolina and Rhode Island—guarantee a criminal defendant the unconditional right to trial *de novo* before a jury meeting the common law requirements in every case in which that right is not available in an inferior court.[6] The right to trial *de novo* by jury on appeal is also guaranteed in three additional states listed by appellee—Arkansas,[7] Maryland[8]

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[6] See Brief for Appellee, pp. 101-108. The question whether a jury trial *de nova* as a matter of right after a bench trial in an inferior court would comply with the Sixth Amendment jury trial guarantee need not be considered on this appeal. It may well be that where neither bond nor delay is excessive, the proceedings in the inferior court would be considered as the equivalent of a preliminary examination. But see *Callan* v. *Wilson*, 127 U. S. 540 (1888). In any event, the fact that the states listed provide for the right to trial *de novo* before a jury, regardless of the proceedings below, demonstrates the rocognition by these states of the importance of providing the jury trial right at some stage of the proceeding. And since the trial *de novo* procedure gives the defendant, at his option, two complete trials, one before a jury, this procedure may be more burdensome than providing the right as an original matter.

[7] ARK. STAT. ANN. Sec. 44-115 (1964) (right to trial by jury in circuit court on appeal from police court); Sec. 44-116 (right to trial by jury in circuit court on appeal from mayor's court).

[8] The Brief for Appellee makes clear that in Maryland a misdemeanor defendant is entitled to trial by jury in the court of the first instance in all except motor vehicle offenses. Pp. 102-103, 144-145. MD. CODE ANN. Art. 66½, Section 325 (1957) provides that motor vehicle convictions may be tried *de novo* at the instance of the

and Minnesota.[9] In two of the remaining three states—Nebraska and New Mexico—the courts referred to by appellee may not impose punishment in excess of six months.[10] In one state, New Jersey, appellee has cited one offense, disorderly persons, which is tried without a jury although a maximum sentence of one year can be imposed.[11] In *State* v. *Maier,* 13 N. J. 235, 99 A. 2d 21 (1953), the Supreme Court of New Jersey in a 4-3 decision determined "disorderly persons" to be a "petty offense" within the meaning of the common law exception.

On pages 109-112 of appellee's brief, the law of twenty-nine jurisdictions is discussed for the purpose of rebutting appellant's contention that, in the thirty-eight states referred to above, the jury that is made available in all cases other than petty offenses is comprised of twelve persons and must render a unanimous verdict. Four of these twenty-nine jurisdictions—Oregon, Texas, Virginia and

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defendant in a criminal court of general jurisdiction. MD. CODE ANN. 66½, Sec. 327 provides that a defendant is entitled to trial by jury on a *de novo* appeal from a motor vehicle violation.

[9] *State* v. *Ketterer,* 248 Minn. 173, 79 N. W. 2d 136 (1956), relied on by appellee, was legislatively overruled by MINN. LAWS 1959, c. 388, sec. 1, now codified as MINN. STAT. sec. 484.63 (Supp. 1966) (appeal *de novo* with jury trial to the district court from every municipal court except Hennepin County). See MINN. STAT. sec. 488A.10(6) (Supp. 1966) (jury trial in Hennepin County Municipal Court).

[10] *Nebraska*: NEB. REV. STAT. Sec. 18-201 (1962) (jurisdiction of police magistrate limited to imposition of three months penalty and $100). See also NEB. REV. STAT. Sec. 29-601 (1962).

New Mexico: Prosecutions that are not initiated by either indictment or information may only be brought in the Municipal Court or the Justices of the Peace Court. The jurisdiction of these courts is limited to three months and six months respectively. N. M. STAT. ANN., Sec. 14-16-1(c) (Supp. 1967), Sec. 36-2-5; Sec. 37-1-2, Sec. 38-1-1 (1953).

[11] N. J. STAT. ANN. Sec. 169-4 (1953).

Puerto Rico—are not included in appellant's list of thirty-eight. Appellee expressly recognizes that in ten other states listed—Connecticut, Delaware, Illinois, Kansas, Maryland, Nevada, Ohio, Vermont, Wisconsin, Wyoming—a defendant may be tried before a jury of less than twelve only upon his consent. See Brief for Appellee, pp. 109-112. In two additional states listed by appellee—Missouri and Montana—a jury of less than twelve men may be impaneled only with the consent of the defendant.[12] In seven additional states—Arizona, Michigan, Nebraska, New Mexico, South Dakota, Tennessee and Washington—the jurisdiction of the courts referred to by the appellee is limited to the imposition of sentences of six months or less.[13] The provisions cited in three states—Arkansas, North Dakota and

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[12] *Missouri*: Mo. Rev. Stat. Sec. 543.210 (1959). The constitutional provision cited by appellee for a two-thirds jury verdict applies only in civil cases. Mo. Const., Art. 1, Sec. 22(a).

Montana: Mont. Rev. Codes Ann. Sec. 95-1901(c) (1968). The Justice of the Peace Courts, in which six persons compose the jury, are limited to the imposition of penalties not greater than six months. *Id.*, Sec. 95-302.

[13] *Arizona*: Ariz. Rev. Stat. Ann. Sec. 22-301 (Supp. 1967) (Justice of the Peace Court); Sec. 22-402 (1956) (Police Court).

Michigan: Mich. Stat. Ann. Sec. 28.1192 (1954) (Justices of the Peace).

Nebraska: Neb. Rev. Stat. Sec. 18-201 (1962) (Police Magistrate). There is no provision in Art. 1, Sec. 11 of the Nebraska Constitution for less than 12 jurors in misdemeanor cases.

New Mexico: N. M. Stat. Ann. Sec. 36-2-5 (1953) (Justice of the Peace Court).

South Dakota: S. D. Code Sec. 32.0922 (Supp. 1960) (Justice of the Peace Court—the only Court not of record).

Tennessee: Tenn. Code Ann. Sec. 40-2504 (1955) (six members in circuit courts for offenses not punishable by imprisonment).

Washington: Wash. Rev. Code Ann. Sec. 3.20.040 (Justices of the Peace Court); Sections 35.20.030, 35.20.250 (Municipal Courts) (1961).

Colorado—refer only to the trial of civil cases.[14] In two of the remaining three states—Mississippi and North Carolina—there is a right to trial *de novo* before a twelve man jury on appeal in criminal cases tried in inferior courts.[15] Appellee appears correct in noting that notwithstanding a general Georgia statute providing for a twelve man jury in all misdemeanor cases,[16] misdemeanors punishable up to twelve months in the county jail are tried by a jury of five in Fulton County, where Atlanta is situated.[17]

In summary, appellee has shown that in one of the thirty-eight states listed by appellant—New Jersey—disorderly persons offenses, punishable up to one year in prison, are not tried by jury, and that in one county of another—Fulton County in Georgia—misdemeanors punishable up to one year are tried before a jury of five. Thirty-six states remain in which trial by a jury meeting the common law and Sixth Amendment requirements is available in all cases punishable in excess of six months. Eleven additional states provide some jury in all such cases, but, generally in the case of less serious crimes, afford a jury of less than twelve in some cases. Only in Louisiana is all right to trial by

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[14] ARK. STAT. ANN. Sec. 26-608 (Repl. 1962); N. D. CONST. Art. I, Sec. 7. In Colorado, a defendant charged with a misdemeanor may demand a twelve man jury. Rule 123(b), COLO. RULES CRIM. PROC. (1963). The source provisions of COLO. GEN. STAT. Sec. 78-7-4 (1963) make clear that the requirement that fees be advanced to secure more than six jurors applies only in civil cases. COLO. LAWS 1887, ch. 14, Sec. 179, p. 155; LAWS 1891, p. 83.

[15] *Mississippi*: MISS. CODE ANN. Sec. 1202 (1942); *North Carolina*: N. C. GEN. STAT. Secs. 15-177, 15-177.1, Sec. 7-195 (1953).

[16] GA. CODE ANN. Sec. 59-707 (1965).

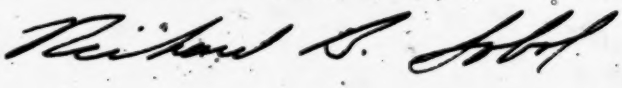
[17] GA. ACTS 1871-2, p. 288; GA. ACTS 1890-1, Vol. 2, p. 938; GA. ACTS 1935, p. 498.

jury denied in a substantial number of serious common law crimes. See Brief for Appellant, Appendix C.[18]

The prevailing practice in a large majority of the American states confirms that trial by jury is considered to be a fundamental right that should be secured by virtue of the due process clause of the Fourteenth Amendment to defendants in state criminal proceedings.

Respectfully submitted,

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[18] Offenses punishable up to one year in prison in New York City and Disorderly Persons offenses in New Jersey appear to be the only circumstances outside Louisiana where all right to trial by jury is denied in a class of cases where that right would be secured by the application of the Sixth Amendment. See Brief for Appellant, Appendix B, p. 8a.